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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM , 1997

BARBARA OHUEGBE , Petitioner

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit.

PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), (as amended) provides that an alien contesting a final order of removal must file within 30 days of the entry of the order, a judicial petition for review before a Court of Appeals having jurisdiction over the alien. The questions presented are :

"1. Whether section 309 (C) (1) of the IIRIRA, created an exception to aliens in exclusion and deportation proceedings before the enactment of the statute.

" 2. Whether under the facts of this case, the court of appeals erred in using this statute as a basis for dismissing the petitioner's petition for review."

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1997

BARBARA OHUEGBE, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, BARBARA OHUEGBE respectfully petitions for a writ of certiorari to review the judgement of United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals dismissing petitioner's petition has not yet been reported. A copy of this opinion is attached to this petition as Exhibit A in the Appendix .

JURISDICTION

The judgement of the United States Court of Appeals, Sixth Circuit, was entered on June 20, 1997. The Court of Appeals denied a timely petition for rehearing on August 13, 1997. On September 22, 1997, the Court of Appeals granted petitioner's motion for stay of mandate pending a writ of certiorari to the United States Supreme Court. "The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). "

STATUTORY PROVISIONS INVOLVED

Section 309(C) (1) and 309 (c) (4) (C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009(Sept 30, 1996) as amended by Pub. L. No. 104-302, 110 Stat. 3009 (1996) provides:

TRANSISTION FOR ALIENS IN PROCEEDINDS

(1) General Rule That New Rules Do Not Apply; Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of Title-A effective date-;

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

STATEMENT

Petitioner, an alien, filed a petition for review of a final order of deportation entered by the Immigration Appeals Board, denying her discretionary relief pursuant to former Section 244 (a) (1) of the Immigration and Naturalization Act(herein called the "Act"). 8 U.S.C §1544 as amended. The Immigration Appeals Board final order of deportation was issued on November 13, 1996. The petition for review was filed in the United States Court of Appeals (Sixth Circuit) on January 9, 1997, pursuant to former 8 U.S.C . §1105a (repealed) which permitted a petition for review of a final order of deportation to be filled within 90 days of the decision.

While petitioner's petition was pending , respondents' filed a motion to dismiss the appeal as untimely. The premise of respondents' motion was that section 309(c) (4) (C) of the IIRIRA, which provided a 30-day grace period for petitions of judicial review of a final order of deportation applied to the case at bar — as opposed to former 8 U.S.C. §1105a (repealed) which provided for a 90 day period . Respondents' contended that although Section 309 of IIRIRA provides that these amendments do not apply to an alien who is in exclusion or deportation proceedings as of title III-A- effective date (September 30, 1996); section 309(c) (4) (C) created an exception by imposing a 30-day period within which an alien must file a judicial petition of review of a final order of removal.

The court of appeals acknowledged that section 309 of the IIRIRA (enacted on September 30,1996, but given an effective date of April 1,1997) did not apply to " aliens in deportation or exclusion proceedings at the date of its enactment." However, in the court's opinion, the petition was untimely because it did not conform to the 30-day period of limitation . In its ruling the court held that section 309(c) (4) (C) did in effect create an exception to the general rule imposed by section 309 of the IIRIRA .Therefore, petitioner's petition for review which was filed 56 days after the final order of deportation was untimely.

The question presented are: (1) whether there was a statutory intent by Congress to exempt certain classes of aliens from the transitional changes made by Section 309 of the IIRIRA. More specifically, whether Congress by giving the IIRIRA a future effective

date, intended that the rights of individuals(aliens) would not be substantially affected until the statute's effective date. (2) Whether under the facts of this case, the court of appeals erred in holding that the petitioner's petition for judicial review was untimely.

PROCEEDINGS BELOW

On or about December 15, 1997, the Immigration and Naturalization Service commenced deportation proceedings against petitioner pursuant to section 241(a) (1) (C) (I) of the Immigration and Nationality Act, in that after admission as a non-immigrant under Section 101(a) (15) of the Act, she failed to maintain or comply with the conditions of her non-immigrant status.

Petitioner through her counsel, Yasser K. Farquat, admitted the factual allegations and conceded the charge of deportability contained in the Order to Show Cause . However, petitioner through her counsel requested suspension of deportation relief pursuant to section 244(a) of the Act (as amended). At the hearing, the administrative judge while conceding that petitioner has satisfied the requirements imposed by section 241(a) (1) (C) (I) , denied the request on the ground that petitioner failed to show that her deportation will result in extreme hardship for herself, or to her spouse, parent, or child who is a citizen or lawful permanent resident of the United States.

Petitioner, appealed the decision of the Administrative judge to the Immigration Appeals Board (herein called the "Board"). While the appeal was pending before the "Board", Congress passed the IIRIRA, which made sweeping changes to the existing Immigration and Nationality Act . However, Congress postponed the effective date of the IIRIRA to April 1, 1997. On November 13, 1997, the Board dismissed petitioner's

appeal on the ground of insufficient evidentiary basis of hardship . Petitioner was advised by her counsel of record , Yasser Farhart , that she had 90 days within which to appeal the "Board" decision to the United States Court of Appeals for the Sixth Circuit. Due to differences between petitioner and Mr. Farhart, petitioner was forced to retain new counsel, Ohuegbe Clements Esq, on January 4, 1997. Thereafter, a petition for review of the Board 's final order of deportation was filed on her behalf on January 9, 1997.

Respondents' filed a motion to dismiss the petition for review on the ground that it was untimely. On June 20,1997, the court of appeals dismissed the petition on the ground that it was untimely. The court of appeals while conceding that Section 309 of the IIRRIA did in fact exempt certain classes of aliens — particularly those in exclusion and deportation proceedings as of title III effective date — ruled that section 309(c) (4) (C) created an exception to the general provisions of section 304 (c) (1) of IIRIRA.

The court of appeals dismissed the legislative history of the "IIRIRA" on the ground that it showed no clear intent on the part of Congress to exempt certain classes of aliens from the operation of statute, pending the effective date of the statute. In the court's view, Congress " specifically addressed transition cases such as this one, where deportation proceedings were pending at the time of enactment." The court of appeals believed that section 309 (c)(4) (C) did operate as an exception to the general provisions of section 309 of the IIRIRA . As the court concluded in its opinion, " ..... because the petition for review was not filed within 30 days allowed by statute, we conclude this appeal is untimely." (See App A. pp.2)

Whereupon, petitioner filed a petition for rehearing. On August 13, 1997, the court

of appeals denied petitioner's petition for rehearing. However, on September 22,1997, the court of appeals granted petitioner's motion for a stay of mandate pending a petition for writ of certiorari to the United States Supreme Court .

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

As a general rule , " the starting point in statutory interpretation is the language of the statute itself ." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756, , 93 S. Ct 782,786,46 L. Ed .2d 22 (1975). Therefore a court must always "assume that the legislative purpose is expressed by the ordinary meaning of the words used." American Tobacco Co v. Patterson, U.S 63, 68 , 101 S. Ct 231, 70 L.Ed.2d 34 (1992) .

Generally, Congress has the power to fix a date when an act or statute is to go into effect. In such cases the effective date becomes the operative date of the statute, not the date of the enactment. It is clear that Congress intended the Illegal Immigration and Immigrant Responsibility Act of 1996 to have an effective date of April 1, 1997. See Pub L. 104-208, 110 Statute 3009 (Sept. 30 ,1996).

Prior to the passage of the IIRIRA, former 8 U.S.C 4 § 1105a allowed a judicial petition for review of a final order of deportation to be filed within 90 days of the decision. However , § 1105a was repealed by the IIRIRA. The provisions with respect with judicial review are now found at 8 U.S.C §1252, which provides in pertinent part that "... a petition for review must be filed not later than 30 days after the date of the final order of removal." See 8 U.S.C. § 1252(b)(1). However, Section 309 of the IIRIRA provides that ;

" ..... in the case of an alien who is in deportation proceedings or exclusion proceedings as of Title III-A effective date {April 1, 1997— the amendments made by this subtitle shall not apply; and (B) the proceedings(including judicial review thereof) shall be conducted without regard to such amendments. "

It is undisputed that at the enactment of the IIRIRA (September 30, 1996), petitioner was an " alien in exclusion or deportation proceedings", and therefore, exempted from the transitional provisions of the IIRIRA . The clear and specific language of this section lends itself to this interpretation. There is absolutely no language in § 309(c) (1) , that compelled the court of appeals to apply the new limitation period for judicial review to petitioner's case. The court of appeals ignored the clear import of this section by ruling that section 309(c) (4) (C) created an exception for the 30-day provision. In the court of appeals opinion, section 309(c) (4) (C) mandates that where a final order of deportation is entered more than 30 days after enactment of the IIRIRA (October 31, 1996), the petition for judicial review must be filed no late than 30 days after the date of the final order of exclusion or deportation ." (infra App. A pp. 2) .

In petitioner's case, the Board of Immigration Appeals entered its decision on November 13, 1996, (15 days after the enactment of the IIRIRA -- October 30,1997) which is well within the 30-day grace period granted by section 309 (c) (4) (C) of the IIRIRA . Therefore, the court of appeals erred in holding that the 30-day period for appeal was applicable to petitioner's case.

The language used by Congress in section 309 of the IIRIRA is clear , unambiguous and unequivocal. The words " *where a final order of deportation is entered more than 30 days after the enactment of the* IIRIRA, or October 31, 1996" (italics

supplied) are specific and manifest. The court of appeals failed to appreciate that Congress naturally would use different language if it intended otherwise. See Harrison v. PPG Industries, Inc., 446 U.S 578, 592 (1980) (' In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of a dog that did not bark").

The IIRIRA was an Omnibus Act that was attached as a rider to a spending bill. There was no congressional debate(s) pertaining to this statute prior to its enactment. However, there was congressional intent that the IIRIRA must have a future effective date, different from its enactment date. This was necessitated by the fact that this statute made radical and fundamental changes to the Immigration and Nationality Act, as it were. Furthermore, there was the implied need to give attorneys, aliens, immigrants and their social representatives, an opportunity to acquiesce themselves with the significant changes made to the Immigration Laws of the United States.

The court of appeals dismissed these explicit references on the curious ground that the language used by Congress in Section 309(c) (4) (C) did not lend itself to any other interpretation . Thus, the court of appeals was forced to erroneously conclude that all final orders of deportation entered after the enactment of IIRIRA were automatically subject to the 30-day rule. Therefore, under this flawed reasoning the words " *where a final deportation order is entered more than 30 days after the enactment of the* IIRIRA, *or October 30, 1996,* becomes redundant and superfluous . Had Congress intended the 30-day rule to apply to all final orders of deportation entered after the enactment of the IIRIRA or October 30, 1996, surely it could have excluded the words " *more than 30 days after the enactment of the IIRIRA or October 30, 1996".* See Rubin v United States,

449 U.S 424, (1981) (citations omitted) Furthermore, the language used in section 309(c) (1) must be read to exclude all aliens in deportation and exclusion proceedings , including judicial review, at the enactment of the IIRIRA. This in itself excludes petitioner's appeal from the operation of section 309 (c) (4) (C) of the IIRIRA .

Accordingly, both the language of the statute construed in light of its ordinary meaning, and the legislative history contradict the court of appeals' decision. This court should grant Barbara Ohuegbe's petition to correct the Sixth Circuit error.

II. The Court of Appeals Interpretation of Section 309, conflicts with the Ninth Circuit's Interpretation .

Generally, the power to enact laws includes the power to fix a future effective date. Therefore, a statute with a definite effective date commences operation from the effective date not the date of its enactment. In fact, a repealing clause in a statute with a future effective date will not be operative until the statute itself takes effect . See United States v. Casson , 434 F2d ,415 (App DC 1970). Therefore, where Congress passes an act which amends an existing statute, the existing statute remains in full force during the time between the passage of the amendatory act and the time the amendatory act becomes effective. United States Nuclear Corp. v Cannon, 553 F Supp 1220 (D RI 1982) .

An enactment is a law on its effective date only in the sense that it cannot be changed except by legislative process. The right of individuals under its provisions are not substantially affected until the provision operates as law. In Asteros v INS., 104 F3d 267 (9th Cir.1996), the Ninth Circuit faced the same issue as the Sixth Circuit did in this case. In that case, the INS urged the Ninth Circuit to dismiss petitioner's claim for discretionary relief (suspension of deportation), on the ground that sections 304 and 309

of the IIRIRA applied to the case. Section 304 repealed 8 U.S.C § 1244 with a new procedure called " cancellation of removal"(8 U.S.C § 1204A). Section 309(c) (5) which dealt with " Transitional Rules with Regard to Suspension of Deportation" provides that the seven (7) years period shall be superseded by a new ten (10) year period . This was crucial since the petitioner in this case had only seven years of domicile in the United States . Furthermore, the section provided that it shall apply to notices to appear issued before, on, or after the date of enactment of the Act .The Ninth Circuit in rejecting the INS argument that the section applied , stated as follows;

> **"[S] 309 (c) (5) concerns the retroactivity of the new § 204A once it becomes effective. It qualifies the general rule that the new rules do not apply..... In the case of an alien who is in exclusion or deportation proceedings as of the effective date of the IIRIRA § 309(c) (1). The fact that on and after April 1, 1997 the new requirements may apply retroactively to Trigger Cutoff dates based on notices to appear issued prior to April 1, 1997 does not change the Effective date itself... The applicable sections of the new laws have an effective date of April 1, 1997 . They do not apply here" .**

Therefore, the Sixth Circuit expressly rejected the Ninth Circuit's holding . There is no realistic prospect for resolution of this matter without a decision by this court. Any appellate decision will merely side with the Sixth Circuit or side with the Ninth Circuit.. Therefore the Court should grant certiorari to review these important conflicts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted

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Dated 18th of Dec 1997

APPENDIX

1. Order of the United States Court of Appeals (Sixth Circuit) , entered on June 20, 1997 (attached).

2. Order of the Board of Immigrations Appeals , entered on November 13, 1996 (attached).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARBARA CHIOMA OHUEGBE

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ORDER

Before : KRUPANSKY, NELSON, and BOGGS, Circuit Judges.

The petitioner seeks review of a decision of the Board Immigration Appeals that affirms the denial of her application for suspension of deportation. The Immigration Naturalization Service now moves to dismiss this appeal as untimely. The petitioner responds in opposition.

The Board issued its decision on November 13, 1996. The petition for review was filed in this court on January 9, 1997. Former 8 U.S.C s 1105a permitted a petition for review of a final order of deportation to be filed within 90 days of the decision . However, s 1105a was repealed by Illegal Immigration Reform and Immigrant Responsibility Act of 1996(IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3009 (1996). The provisions with respect to judicial review are to be found at 8 U.S.C. s 1252, which provides in part that a " petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C s 1252(b)(1). Section 309 (c)(4)(C) of the IIRIRA specifically addresses "transition cases," such as this one, where deportation proceedings were pending at the time of enactment. Although s 309 generally provides that the amendment do not apply to cases pending at the time of enactment, September 30, 1996, it does make an exception for the 30 day provisions. Section 309(c)(4)(C) provides that where a final order of deportation is entered more than 30 days after the enactment of IIRIRA, or on October 31, 1996,"the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation.

In this case, the Board entered its decision on November 13, 1996, and the 30-day period for appeal was therefore applicable. Two other circuits, faced with appeals from final orders of deportation entered in November of 1996, have reached the same conclusion. *Ibrik V. INS*, 108 F.3d 596(5th Cir. 1997); *Narayan V. INS*, 105 F.3d 1335

(9th Cir. 1997)(order). Because the petition for review was not filed within the 30 days allowed by statute, we conclude this appeal is untimely. This court is without authority to extend the time for an appeal . See *Nakleh v. INS*, 38 F.3d 829, 831 (6th Cir. 1994).

Therefore , the motion to dismiss this appeal as untimely is GRANTED.

ENTERED BY THE ORDER OF THIS COURT.

APPENDIX B

U.S Department of Justice
Executive Office for Immigration Review — Decision of the Board of Immigration

Falls Church, Virginia 22041.

File : A 73 021 597 - Detroit — Date Nov 13, 1996

In re : CHIOMA BARBARA OHUEGBE

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT : Yasser K. Farhar, Esquire
14650 West Warren Avenue
Dearborn, Michigan 48126

ON BEHALF OF SERVICE: Michael B. Dobson
Assistant District Counsel

CHARGE:

Order: Sec 241 (a)(1)(C)(I), I&N [illegible] S.C. s 1251(a)(1)(C)(I)-
Non immigrant – failed to [illegible] ply with conditions of status

APPLICATION: S[illegible]spension of dep[illegible]tation ; voluntary departure

ORDER:

PER CURIAM: On December 15, 1995, an Immigration Judge found the respondent deportable as charged and denied her application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. s 1254(a)(1), but granted her voluntary departure pursuant to section 244(e) of the Act in lieu of deportation. The respondent ha s appealed from the denial of suspension of deportation. The appeal will be dismissed.

The respondent is a 27 year –old native and citizen of Nigeria, who entered the United States on March 20, 1982, as a non-immigrant student. On Feburary 2, 1995, the Service served her with an order to show cause , i charging her with deportability pursuant to section 241(a)(1)(C) (I) of the Act, as an alien who failed to maintan her

status under which she was admitted. The respondent conceded deportability. To establish eligibility for section 244(a)(1) suspension relief, an alien must prove that he has been physically present in the United States for a period of 7 years preceding his application, that he has been a person of good moral character for the same period, and that his deportation will result in the extreme hardship to himself or his United States citizen or permanent resident spouse , child , or parent.

Upon review of the record, we find that the Immigration Judge 's decision to deny the respondent 's request for suspension of deportation was proper and correct for the reasons stated by the Immigration Judge. The Immigration Judge considered all the factors in the record and concluded that the respondent had failed to demonstrate extreme hardship to her self or to a qualifying relative. The Immigration Judge noted the period of time which the respondent spent in the United States, as well as her good moral character, based on her testimony. With respect to the extreme hardship, the Immigration Judge noted that the respondent's parents received a college education in that country, respondent has had no contact with her United States spouse since January of 1995, the respondent is in good health and young, and she has skills that would aid her in finding employment in Nigeria. See generally Matter of O-J-O, interim Decision 3280 (BIA 1996). No doubt she will be unable to earn as much money as she can in the United States, but economic hardship does not alone demonstrate extreme hardship. Ramirez-Durazo v. INS., 794 F.2d 491 (9th Cir. 1986). We agree that the record failed to establish extreme hardship to the respondent or to a qualifying relative within the meaning of the Act.

The appeal is dismissed.

We would note that under section 304(a) of the new Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, "suspension of deportation" and "section 212(c) relief" are merged into a new form of relief called "cancellation of removal." However, according to section 309(a) and (c), these new rules apply to new removal proceedings which do not take effect until April 1, 1997. Also under section 309(c) of the Act, continuous physical presence in the United States ends when the alien is served a "Notice to Appear," We note that there is a question as to whether this new provision applies to present proceedings and pending suspension applications. However , in this case at hand, we need not decide this issue because this alien had Already met the seven year continuous physical presence requirement prior to the INS issuing her an Order to Show Cause.

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FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in the Matter of Chouliaris, 16 I&N Dec . 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any other extension as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

THE BOARD.